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TAUFIK GOH ABDULLAH v. PP

HIGH COURT MALAYA, MUAR
AWG ARMADAJAYA AWG MAHMUD JC
[CRIMINAL APPEAL NO: JB-41H-8-02-2020]
19 DECEMBER 2021

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Abstract – *The plea of guilty herein accords with the prescribed procedural law notwithstanding that it was administered in the hospital the appellant was being warded in for his heart related ailments, and notwithstanding that it was administered without the attendance of a medical doctor. The plea was good and admissible as the appellant was in full control of his cognitive and mental faculties and was fully aware of the proceedings. The plea being unequivocal and unqualified, the appellant's conviction must prevail and must stand affirmed.*

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CRIMINAL PROCEDURE: *Appeal – Appeal against sentence and conviction – Appeal against decision of Magistrate – Accused pleaded guilty to alternative charge – Retaining stolen property which he had reason to believe was stolen property – Penal Code, s. 411 – Magistrate accused appellant upon plea of guilty and sentenced him to six months' imprisonment – Whether in plea of guilty case, appeal may be made against conviction and sentence – Whether there was any miscarriage of justice on facts and circumstances of case – Whether court required to consider provisions of s. 294 of Criminal Procedure Code – Whether plea in mitigation given after accused was sentenced vitiated conviction and sentence*

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The appellant had suffered heart conditions and was unable to attend court as he was warded in the hospital. The court proceedings took place in the hospital ward. The appellant was charged at the Magistrate's Court for stealing a motorcar, thereby committing an offence under s. 379A of the Penal Code ('PC') ('main charge'). The prosecution then offered an alternative charge of dishonestly retaining a stolen property which he had a reason to believe was a stolen property, thereby committing an offence under s. 411 of the PC ('alternative charge'). The prosecution's case was that the complainant discovered that her motorcar was no longer at the place where she had parked. She immediately checked with the security guard kiosk to view the CCTV and there, through the video recordings, the complainant saw an unknown man getting into her car and driving off. She lodged a police report and this led to the arrest of the appellant where a set of keys for the motorcar was found on his person and seized. The appellant then showed the police the motorcar. The appellant pleaded guilty to the alternative charge. Satisfied that the appellant pleaded guilty unequivocally and unqualifiedly, the Magistrate convicted the appellant upon his own plea of guilty and sentenced him to six months imprisonment from the date of his arrest. The appellant then set forth his plea in mitigation where he asked for a light

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sentence because he was supporting his wife, his six children and an aged mother. Hence, the present appeal. The issues in this appeal were: (i) whether in a plea of guilty case, the appellant may appeal against conviction and sentence; (ii) whether there was any miscarriage of justice on the facts and circumstances of the case as there was no medical doctor present at the ward when the proceedings was being carried out; (iii) whether the law required the court to consider the provisions of s. 294 of the Criminal Procedure Code ('CPC'); and (iv) whether the plea in mitigation, which was given after the appellant was sentenced, vitiated the conviction and sentence.

Held (dismissing appeal; affirming conviction and sentence):

(1) Section 305 of the CPC prevents a person who has pleaded guilty to go beyond appeal against sentence. The phrase 'there shall be no appeal except as to the extent or legality of the sentence' in s. 305 of the CPC limits the extent by which an appeal may be filed in the High Court in cases where the appellant had pleaded guilty. However, the plea of guilty must be an unequivocal and unqualified, which means a plea that is without conditions and/or exception. When the court in exercising appellate jurisdiction finds that the plea of guilty by an appellant had fulfilled all the legal requirements, the court is not empowered to hear an appeal against conviction and may only proceed to hear appeal against sentence. (paras 17-21 & 28)

(2) As the proceedings were conducted in a specialist hospital, there were medical officers within the hospital itself that could sufficiently deal with any conditions should the need arise. The fact that the appellant was then receiving treatment in a specialist hospital did not show any lack of care by the detaining authority. There was no requirement in law for a medical doctor to be in attendance. The appellant was also in full control of his cognitive and mental faculties and was fully aware of the proceedings. No mental impairment was pleaded nor any suggestion or symptom of depravation of mental capacity. There was no miscarriage of justice that warranted appellate intervention. (paras 35, 37, 42 & 43)

(3) Before s. 294 of the CPC may be applied, the court must look at the nature of the case and find: (i) regard being had to the character, antecedents, age, health or mental condition of the offender; (ii) the trivial nature of the offence; (iii) to any extenuating circumstances under which the offence was committed; and (iv) it was expedient that the offender be released on probation of good conduct. The phrase 'When any person has been convicted of any offence before any court if it appears to the court' in s. 294 of the CPC implied that there must be appearance of any of the above. The burden of showing the above conditions existed rests on the appellant. A scrutiny of the appeal records and the written and oral submissions of the appellant showed none. (paras 45-47)

(4) Under the scheme of Chapter XX of the CPC that governs the procedure of criminal trials in the High Court, there is no statutory requirement for mitigating factors to be considered by the court before it passes sentence according to law. Although there is no provision in the CPC for a plea in mitigation in High Court trials, nevertheless as a matter of fact, in practice, it is quite common to allow a plea in mitigation before the court imposes sentence (*Letitia Bosman v. PP & Other Appeals*). (para 69)

Case(s) referred to:

A Child v. PP [2020] 1 LNS 2113 HC ***(refd)***
Bhandulananda Jayatilake v. PP [1981] 1 LNS 139 FC ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2002] 3 CLJ 457 FC ***(refd)***
Jayanthan v. PP [1973] 1 LNS 56 FC ***(refd)***
Lee Wai Kam v. PP [1974] 1 LNS 72 HC ***(refd)***
Letitia Bosman v. PP & Other Appeals [2020] 8 CLJ 147 FC ***(foll)***
Liow Siow Long v. PP [1969] 1 LNS 98 HC ***(refd)***
Masni Yusoff v. PP [2019] 1 LNS 1984 CA ***(refd)***
Nesa Gandh Batumalai v. PP [2018] 10 CLJ 562 HC ***(refd)***
PP v. Ahmad Khairul Fa'ais Mat Dahlan & Ors [2006] 6 CLJ 555 HC ***(refd)***
PP lwn. Kandasamy Muniandy [2005] 2 CLJ 201 HC ***(dist)***
PP v. Lee Lam (F) [1952] 1 LNS 87 HC ***(refd)***
PP v. Loo Choon Fatt [1976] 1 LNS 102 HC ***(refd)***
PP v. Muhammad Kasyfullah Kassim [2017] 1 CLJ 63 CA ***(refd)***
PP v. Teh Ah Cheng [1976] 1 LNS 116 HC ***(refd)***
R v. Ball (Kenneth John) [1951] 35 Cr App R 164 ***(refd)***
Raja Izzuddin Shah v. PP [1978] 1 LNS 165 HC ***(refd)***
Reg v. Sargeant [1975] 60 Cr App R 74 ***(refd)***
Rex v. Grondkowski [1946] 1 All ER 560 ***(refd)***
Sau Soo Kim v. PP [1975] 1 LNS 158 FC ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 28A, 91, 172A, 172B, 172C, 172D, 172E, 172F, 172G, 173(b), 294, 305, 316
Federal Constitution, arts. 5, 6, 7, 8, 9, 10, 11, 12, 13, 73, 74
Penal Code, ss. 353, 379A, 411

For the appellant - Mohd Fazaly Ali Mohd Ghazaly & Safiah A Aziz; M/s Safiah Aziz & Co
For the respondent - Mustaqim Sukarno; DPP

Reported by Lina E

JUDGMENT

Awg Armadajaya Awg Mahmud JC:

Introduction

[1] This is an appeal against conviction and sentence meted by the learned Magistrate sitting in Muar on 4 February 2020, whereby the learned Magistrate convicted the appellant on his own plea of guilty for an offence under s. 411 of the Penal Code and sentenced him to an imprisonment sentence of six months.

[2] The appellant was charged at the instance of the Public Prosecutor and the main charge reads as follows: A

(English Translation)

> That you on 28 October 2020 at about 11 am, at Wisma Tiam Lock (Inland Revenue Board Building) at No. 19/4, Jalan Sungai Abong, 84000 Muar, in the District of Muar, in the State of Johore, stole a motor car, to wit, a white Perodua MyVi 1.5 SE (auto) with the registration number JTN 1113 valued at RM11,000-00 which belonged to one Nurul Farha binti Pardi (NRIC 840704-01-5596) and you thereby committed an offence under section 379A Penal Code which is punishable under the same provision. B C

[3] The Public Prosecutor offered an alternative charge which reads as follows:

(English Translation)

> That you on 28 October 2020 at about 11 am, at Wisma Tiam Lock (Inland Revenue Board Building) at No. 19/4, Jalan Sungai Abong, 84000 Muar, in the District of Muar, in the State of Johore, dishonestly retains a stolen property to wit, a white Perodua MyVi 1.5 SE (auto) with the registration number JTN 1113 valued at RM11,000-00 which belonged to one Nurul Farha binti Pardi (NRIC 840704-01-5596) which you have reason to believe that it is a stolen property and you thereby committed an offence under section 411 Penal Code which is punishable under the same provision. D E

[4] The appellant was warded at Sultanah Fathimah Specialist Hospital in Muar at the time and the proceedings took place in the ward.

[5] Both the main charge and the alternative charge were read and explained to the appellant and he understood both charges. F

[6] The appellant pleaded guilty to the alternative charge. After the learned Magistrate ascertained that the appellant understood the nature and consequences of his plea of guilty, the learned Deputy Public Prosecutor tendered the brief facts which were read and explained to the appellant, to which the appellant admitted as correct. G

[7] The exhibits tendered by the prosecution were also admitted as correct by the appellant. Having conducted the procedures and after the learned Magistrate was satisfied that the appellant pleaded guilty unequivocally and unqualifiedly, she convicted the appellant upon his own plea of guilty and sentenced him six months imprisonment to be effective from the date of arrest. H

[8] According to the appeal records (encl. 18 p. 15), the appellant then set forth his plea in mitigation where he asked for a light sentence because he is supporting his wife and six children as well as an aged mother. I

[9] The learned Deputy responded by submitting the aggravating factors that a heavy sentence should be meted out as this is a serious offence.

[10] Soon after the court meted out the sentence, the appellant applied for a stay of execution of the sentence through learned counsel from the National Legal Aid Foundation, Madam Safiah A. Aziz. After hearing parties, the learned Magistrate allowed the application for stay with bail amount of RM8,000 and two sureties, both of whom must be Malaysian citizens and the appellant is to report himself to the nearest police station every fortnight.

Background Facts

[11] Nurul Farha binti Pardi is a staff at the Statistics Department in Muar. Her office is situated at Wisma Tiam Lock (which is the Inland Revenue Board Office, Muar) is situated at No. 19/4, Jalan Sungai Abong, 84000 Muar, in the District of Muar, in the State of Johore. On 28 January 2020 at about 1pm, she left the office to have lunch with friends and she walked to the parking lot of the building.

[12] When she reached the parking bay where she left her car earlier, and her car, which is a white car of the brand Perodua MyVi 1.5 SE (auto) with the registration number JTN 1113, was no longer there.

[13] She immediately went to the security guard kiosk to view the CCTV and she saw through the video recordings that an unknown man got into her car and drove it off at about 11.15am that day. She then lodged a police report (Muar Report/1244/20) at the Muar Police Station in the State of Johore.

[14] On the 28 January 2020 at 11pm, Inspector Mohd Afzan bin Musa led a police team from the Muar Police Headquarters arrested the appellant at a house no. 5, Jalan Ilham 21, Taman Ilham, 86000 Kluang, Johore, and found on his person (after a bodily search was conducted) a set of keys for a Perodua MyVi car and seized a few other items.

[15] The appellant showed him the car which was later found to be (based on chassis and engine number) to be a white car of the brand Perodua MyVi 1.5 SE (auto) with the registration number JTN 1113 which was reported stolen *vide* Muar Report/1244/20.

[16] The appellant was informed of his rights under s. 28A Criminal Procedure Code and an arrest report was lodged (Kluang Report/001738/20). A search list was also issued and signed by the appellant and the appellant was remanded for investigation where he admitted of being in possession of the white Perodua MyVi 1.5 SE (auto) with the registration number JTN 1113 which he has reasonable grounds to believe that it was stolen.

The Issues In This Appeal

(i) Whether in a plea of guilty case, the appellant may appeal against conviction as well as sentence.

(ii) Whether there was any miscarriage of justice on the facts and circumstances of the case.

(iii) Whether the law requires the court to consider the provisions of s. 294 Criminal Procedure Code.

(iv) Whether the plea in mitigation was given after the appellant was sentenced vitiate the conviction and sentence

I shall deal with the issues accordingly.

Whether In A Plea Of Guilty Case, The Appellant May Appeal Against Conviction As Well As Sentence

[17] The law is laid down under s. 305 Criminal Procedure Code which reads as follows:

> 305. When plea of guilty limited right of appeal
>
> When an accused person has pleaded guilty and been convicted by a Magistrate on that plea, there shall be no appeal except as to the extent or legality of the sentence.

[18] This statutory provision prevents a person who pleaded guilty to go beyond appeal against sentence.

[19] It must be, however an unequivocal and unqualified plea of guilty.

[20] An unequivocal and unqualified plea means that a plea that is without conditions and/or exceptions.

[21] The phrase "there shall be no appeal except as to the extent or legality of the sentence" limits the extent by which an appeal may be filed in the High Court in cases where the appellant had pleaded guilty.

[22] These limitations are inapplicable in the following cases:

(i) Conditional plea of guilty. "Conditional plea" means "a plea that does not fulfil the legal requirement in relation to a plea of guilty". However a plea of guilty that is as a result of plea bargaining pursuant to s. 172C because a plea bargaining pursuant to s. 172C is a plea without conditions and is not a conditional plea.

(ii) Plea of guilty that does not fulfil the requirements of s. 173(b) as discussed earlier.

(iii) a plea of guilty before the court that has no local jurisdiction or legal jurisdiction.

(iv) A plea of guilty that is without consent or was induced by anything other than what is provided by law. An example is a plea of guilty upon a promise of monetary benefits. Such is a conditional plea.

(v) Any other conditions that raised a reasonable doubt as to its voluntariness or unconditional or unequivocal nature that may invite the intervention of the court that is exercising the appellate jurisdiction and power.

[23] All amendments to the Criminal Procedure Code especially ss. 172A, 172B, 172C, 172D, 172E, 172F and 172G are legitimate and the operations of such amendments cannot be interpreted as contrary to other provisions of the Criminal Procedure Code. The amendments are made pursuant to the Amendment Act (Criminal Procedure Code) 2012 which is Act A1422 and gazetted in the Federal Government *Gazette* P.U.(B) 189/2012 which came into effect on 1 June 2012.

[24] In the case of *Masni Yusoff v. PP* [2019] 1 LNS 1984 the Court of Appeal ruled as follows:

> In the premises, as correctly submitted by the learned DPP, section 305 of the Criminal Procedure Code applies. The section provides that where accused person has pleaded guilty and has been convicted, there shall be no appeal except as to the extent or legality of the sentence.

[25] In the case of *PP v. Muhammad Kasyfullah Kassim* [2017] 1 CLJ 63, the Court of Appeal discussed the limitations of an appeal in cases of plea of guilty and said:

> The conviction of the respondent was never appealed against and canvassed before us. The appeal before us was solely by the prosecution and it was only on sentence. As the respondent has pleaded guilty and had been convicted on that plea, "there shall be no appeal except as to the extent or legality of the sentence": see s. 305 of the Criminal Procedure Code. That being the case, we propose to deal with the issue of sentence only in this judgment.

[26] In the case of *Nesa Gandh Batumalai v. PP* [2018] 10 CLJ 562 it was held that, "By virtue of s. 305 of the Criminal Procedure Code, no appeal should lie against conviction except as to the extent or legality of the sentence. Rightfully, the appellant did not challenge the conviction but prayed for a shorter sentence."

[27] In the case of *Lee Wai Kam v. PP* [1974] 1 LNS 72; [1976] 2 MLJ 19, His Lordship Justice Eusoffe Abdoolcader said, "Normally by virtue of the provisions of s. 305 of the Criminal Procedure Code (FMS Cap. 6) no appeal will lie when an accused person has pleaded guilty as the appellant did in this case in the lower court".

[28] When the court in exercising appellate jurisdiction found that the plea of guilty by an appellant has fulfilled all the legal requirements, the court is not empowered to hear an appeal against conviction and may only proceed to hear appeal against sentence.

Whether There Was Any Miscarriage Of Justice On The Facts And Circumstances Of The Case

[29] The complaint advanced by learned counsel for the appellant was that the entire proceedings was conducted in a hospital which is the Sultanah Fathimah Specialist Hospital in Muar. The appellant was suffering from heart conditions and was unable to attend court within the vicinity of the court building and the learned Magistrate had to go to the hospital for the benefit of the appellant to conduct the mention of the case in view of the fact that the appellant was taken ill.

[30] Learned counsel further submitted that nowhere in the appeal records does it show that there is any medical doctor present at the ward when the proceedings was being carried out.

[31] I have read the appeal records and found in encl. 18 at pp. 14 to 15 that the appellant knew the nature and consequences of the appeal.

[32] Learned counsel for the appellant filed a medical report which is encl. 27.

[33] The diagnosis based on encl. 27 was that the appellant had (at the time):

(i) Unstable Angina.

(ii) Hypokalemia.

(iii) Hyperthyrodism.

(iv) Underlying thyrotoxicosis cardiomyopathy and a trial fibrillation.

[34] Unstable angina is chest discomfort or pain caused by an insufficient flow of blood and oxygen to the heart. Hypokalemia is a metabolic imbalance characterised by extremely low potassium levels in the blood. Hyperthyroidism is the condition that occurs due to excessive production of thyroid hormones by the thyroid gland. It causes rapid heartbeat, sudden weight loss, tremor, difficulty sleeping and changes in menstrual cycle. Atrial fibrillation (AF or A-fib) is an abnormal heart rhythm (arrhythmia) characterised by rapid and irregular beating of the atrial chambers of the heart.

[35] In short these are all heart-related ailments. As the proceedings were conducted in a specialist hospital, there are medical officers within the hospital itself that could sufficiently deal with any treatment of any

conditions if the need arises. There is no requirement in law for a medical doctor to be in attendance. These ailments (which the court accepted as true) are treatable within the Malaysian Health System.

[36] I take note that in the same medical report prepared by Dr Choo Gee Anne, an internal medicine specialist at the said hospital, that the appellant has full Glasgow Coma Scale, is feeling comfortable, with clear lungs and no neurological deficit as well as no pedal oedema and no murmur in the cardiovascular system.

[37] This shows that the appellant is in full control of his cognitive and mental faculties and is fully aware of the proceedings. No mental impairment was pleaded nor any suggestion or symptom of depravation of mental capacity. This court will not conjure one in the absence of evidence.

[38] In short, he was not suffering from any conditions that require immediate attention or is potentially life-threatening or dangerous to his health.

[39] The list of medications prescribed to the appellant could amply assist him in his life.

[40] There was a referral letter for follow up at the Sultan Ismail Hospital in Johor Bahru.

[41] With the greatest respect to learned counsel, this court is unmoved by his pleas because the medical report that he tendered (and it was not objected to by the learned Deputy) is of no assistance to the appellant.

[42] Contrary to what learned counsel was trying to make the court believe, it gave an account that the conditions (while they exist) are not beyond treatment. The very fact that the appellant was then receiving treatment in a specialist hospital does not show any lack of care by the detaining authority.

[43] In *Sau Soo Kim v. PP* [1975] 1 LNS 158; [1975] 2 MLJ 134 the Federal Court guided us in these words:

> But, where an accused person is not represented by Counsel at trial, then perhaps an Appellate Court should peruse the record of trial carefully to satisfy itself that there has been no irregularity giving rise to miscarriage of justice. Being unrepresented, he would not have the benefit of legal advice. It is proper in such a situation to correct miscarriage justice arising from any misconception of law, irregularity of procedure or apparent harshness of treatment resulting in injury or undue hardship to such an accused.

Having perused over the appeal record (encl. 18) I found no miscarriage of justice that warranted appellate intervention.

Whether The Law Requires The Court To Consider The Provisions Of S. 294 Criminal Procedure Code

[44] Section 294 reads as follows:

294 First offenders

(1) When any person has been convicted of any offence before any Court if it appears to the Court that regard being had to the character, antecedents, age, health or mental condition of the offender or to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed it is expedient that the offender be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond with or without sureties and during such period as the Court may direct to appear and receive judgment if and when called upon and in the meantime to keep the peace and be of good behaviour.

(2) The Court may, if it thinks fit, direct that the offender shall pay the costs of the prosecution or some portion of the same within that period and by such instalments as may be directed by the Court. Section 432 shall be applicable to any direction made under this subsection.

(3) If a Court having power to deal with the offender in respect of his original offence, or any Court of summary jurisdiction, is satisfied by information on oath that the offender has failed to observe any of the conditions of his bond, it may issue a warrant for his apprehension.

(4) Any offender when apprehended on any such warrant shall, if not immediately brought before the Court having power to sentence him, be brought before a Magistrate, and the Magistrate may either remand him by warrant until the time at which he is required by his bond to appear for judgment or until the sitting of a Court having power to deal with his original offence, or may admit him to bail with a sufficient surety conditioned on his appearing for judgment.

(5) The offender, when so remanded, may be committed to prison and the warrant of remand shall order that he be brought before the Court before which he was bound to appear for judgment or to answer as to his conduct since his release.

(6) This section shall not apply:

(a) if the offender is charged with a serious offence; or

(b) if the offender is charged with the commission of an act of domestic violence as defined under section 2 of the Domestic Violence Act 1994.

[45] Before s. 294 may be applied, the court must look at the nature of the case and find:

(i) regard being had to the character, antecedents, age, health or mental condition of the offender; or

(ii) to the trivial nature of the offence; or

(iii) to any extenuating circumstances under which the offence was committed; and

(iv) it is expedient that the offender be released on probation of good conduct.

[46] The phrase "when any person has been convicted of any offence before any court if it appears to the court" implies that there must be appearance of any of the above.

[47] The burden of showing the above conditions existed rests on the claimant (in our instant case, the appellant). I have scrutinised the appeal records as well as the submissions of learned counsel, both written and oral, and found none. This makes s. 294 Criminal Procedure Code different from other legislations, the child to cite an example.

[48] Section 294 Criminal Procedure Code is unlike the Child Act 2001 which makes it mandatory for the court to see the first on the list of s. 91 and go down the list after eliminating the suitability of the options starting from (a) and so forth.

[49] Section 91 reads:

91. Powers of Court For Children on proof of offence

(1) If a Court For Children is satisfied that an offence has been proved the Court shall, in addition to any other powers exercisable by virtue of this Act, have power to:

(a) admonish and discharge the child;

(b) discharge the child upon his executing a bond to be of good behaviour and to comply with such conditions as may be imposed by the Court;

(c) order the child to be placed in the care of a relative or other fit and proper person:

(i) for such period to be specified by the Court; and

(ii) with such conditions as may be imposed by the Court;

(d) order the child to pay a fine, compensation or costs;

(da) make a community service order;

(e) make a probation order under section 98;

(f) order the child to be sent to an approved school or a Henry Gurney School;

(g) (Deleted by Act A1511: s. 66)

(h) impose on the child, if he is aged fourteen years and above and the offence is punishable with imprisonment and subject to subsection 96(2), any term of imprisonment which could be awarded by a Sessions Court.

(2) The words "conviction" and "sentence" shall not be used in relation to a child dealt with by the court for children and any reference in any written law to a person convicted, a conviction and a sentence shall, in the case of a child, be construed as a child found guilty, a finding of guilt and an order made upon a finding of guilt respectively.

(3) A finding of guilt of a child shall be disregarded for the purposes of any written law which:

(a) imposes any disqualification or disability upon a convicted person; or

(b) authorises or requires the imposition of any such disqualification or disability.

[50] In *A Child v. PP* [2020] 1 LNS 2113, the offender (a child) was charged on two charges of which one is under s. 411 Penal Code and the other under s. 379A of the same Code. The learned Magistrate failed to consider the options from (a) to (h) and the High Court had to intervene accordingly.

[51] The application of s. 294 can be seen in *Raja Izzuddin Shah v. PP* [1978] 1 LNS 165; [1979] 1 MLJ 270 where His Lordship, Justice Hashim Yeop A Sani states as follows:

> No plea in mitigation should be thrown aside lightly but must be examined and considered equally with the facts presented by the prosecution. Both aspects of the case must be considered in their true perspective so as to strike if possible, a true balance in the scale of justice.

[52] The aforesaid case involved a charge of assaulting a public servant under s. 353 of the Penal Code which was punishable with imprisonment for a term which may extend to two years, or with fine, or with both. The accused in that case (who had pleaded guilty) had been sentenced to three months' imprisonment. The learned judge set aside the sentence and bound over the accused stating that:

> Considering all the facts before the court I have come to the conclusion that the public interest is in no way better served by committing the appellant to prison. The primary purpose of punishment is reformatory and it is clear in this case that the appellant has realised the fact that notwithstanding his status he is not above the law. He has also clearly stated that he has repented and would not make the same mistake again. Under the circumstances it is my opinion that the public interest is best served by setting aside the sentence of imprisonment and substituting therefore an order under section 294(i) of the Criminal Procedure Code

A that the appellant enter into a bond with one surety in the sum of one thousand dollars for a period of two years and in the meantime to keep the peace and be of good behaviour.

[53] The effect of such an order can be further seen when it was clearly spelled out in the case of *Jayanthan v. PP* [1973] 1 LNS 56; [1973] 2 MLJ B 68, wherein His Lordship Justice Ong Hock Sim (speaking for the Federal Court) observes as follows:

> This section vests the court before which a person is convicted with power to suspend sentence for such period as the court may direct, and, if the offender behaves himself during such period, he would escape C punishment for his offence. If he fails to observe the conditions of his bond, he would be liable to be apprehended and dealt with for his original offence. Thus, in the instant case, the appellant was in effect given a suspended prison sentence. He has to behave himself for a period of five years. If he behaves himself during the five years period, he would escape punishment for the offence but if he fails to observe the conditions of his D bond, he will then be arrested and dealt with for the original offence of rape ...

[54] His Lordship Justice Raja Azlan Shah (as His Majesty then was) stated in *Liow Siow Long v. PP* [1969] 1 LNS 98; [1970] 1 MLJ 40 as follows:

> E It is not in doubt that the right measure of punishment for an offence is a matter in which no hard and fast rules can be laid down and it is to be determined by a consideration of a variety of circumstances. In assessing sentence, the primary consideration is the character and magnitude of the offence, but the court cannot lose sight of the proportion which must be maintained between the offence and the F penalty and the extenuating circumstances which might exist in the case.

[55] I take note that the appellant pleaded guilty before the trial started. Judicial time and expenses were saved. Witnesses are spared of not only trips to the court away from work or other responsibilities but more importantly they are spared of the rigorous cross-examination in a criminal trial.

G *Whether The Plea In Mitigation Was Given After The Appellant Was Sentenced, Vitiate The Conviction And Sentence*

[56] It has been highlighted by learned counsel for the appellant that the plea in mitigation was given only after the appellant was sentenced to six H months imprisonment.

[57] This may be found in encl. 15 (notes of proceeding) at p. 2 which reads as follows:

(English Translation)

I

Kluang 1738/2020	–	P2
Car Ownership Certificate	–	P3
Search List	–	P4

Photographs of scene of incident – P5 A-D

Photographs of exhibits – P6 A-D

Photographs of seized items – P7 A-C

DPP: Accused has no previous conviction of a similar nature

Accused: Admitted the photographs as true and correct

Court: The accused is found guilty and convicted on the alternative charge

Sentence: Taufik Goh bin Abdullah (NRIC: 750102-01-5733)

Offence: Section 411 Penal Code, found guilty and convicted on the charge

Imprisonment: 6 months from the date of arrest

Mitigation:

Accused: ask for lenient sentence, support wife and 6 children and aged mother

DPP: Ask for heavy sentence as the offence is a serious offence

Decision:

Disposal through Plea of Guilty (Not a full trial)

Sgd

Amalina Basirah binti Md Top
(emphasis added)

[58] Section 173 Criminal Procedure Code stipulates as follows:

173. Procedure in summary trials

The following procedure shall be observed by Magistrates in summary trials:

(a) …

(b) **If the accused pleads guilty to the charge, whether as originally framed or as amended, the plea shall be recorded and he may be convicted on it and the Court shall pass sentence according to law:**

Provided that before a plea of guilty is recorded the Court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him.

… (emphasis added)

[59] The procedures concerning conviction and sentence are two different procedures. This is because s. 173(b) expressly use the conjunction "and" in "he may be convicted on it and the court shall pass sentence according to law:

[60] Now, the maxim *audi alteram partem* must be applied in full measure in a criminal trial.

[61] The first is when an accused person faced a criminal charge and he must be given the chance to be heard and this may be found in many places.

[62] The first is the right is exercised during the cross-examination of prosecution cases. The second is when defence has been called and the accused person elected to put his defence.

[63] Although an accused person during the defence stage has three options namely (i) give evidence on oath and be subjected to cross-examination; (ii) give testimony from the accused dock without an oath and he is spared the cross-examination; and (iii) remain silent.

[64] In the two options ie, (i) give evidence on oath and be subjected to cross-examination; and (ii) give testimony from the accused dock without an oath, it affords the accused person the opportunity to present his case before the court and the court must consider the defence no matter how weak or preposterous it may sound. The right to remain silent is when the accused person decided to waive his right to be heard

[65] The next right to be heard is during mitigation. The court must as far as possible, pass a sentence after considering the seriousness of the offence, any previous convictions (if any), a plea of mitigation factors and aggravating factors.

[66] The Cambridge English Dictionary (Cambridge University Press 2021) defines "to mitigate" as:

(1) to make something less harmful, unpleasant, or bad:

(2) to make something less severe or less unpleasant

(3) (in law) situations that are not an excuse for a crime, but that a court of law may consider to be important enough to reduce the blame or punishment of the accused person:

[67] In *Letitia Bosman v. PP & Other Appeals* [2020] 8 CLJ 147 the Federal Court held that

> The Fair Trial Point: Right To Mitigation
>
> [122] Taking the first prong, as I understand learned counsel's argument, the mandatory death penalty violated the appellants' right to a fair trial because the effect of the mandatory death sentence is that the appellants were deprived of the right to mitigation. He argued that the right to be heard in mitigation is an integral part of the right to a fair trial. It was argued, the appellants were prevented from making any meaningful representations to the court on the appropriate sentence on the appropriate punishment.

[123] Now, all criminal trials should be conducted in accordance with the provisions of the CPC (see s. 3). It is clear from the provisions in Chapter XX of the CPC that deals with the procedure in "Trials Before the High Court" in s. 178 to s. 183 that sentencing process takes place after the conclusion of a trial that is upon the conviction of an accused person.

Section 182A provides for the procedure at the conclusion of a criminal trial. If the court finds that the prosecution has proved its case beyond reasonable doubt, the court shall find the accused guilty and he may be convicted thereon (see s. 182A(2)). Notably, the provision that immediately follows s. 182A is s. 183, which expressly provides that "if the accused is convicted, the court shall pass sentence according to law".

[124] Sentencing is the final process in a criminal trial. A sentence is a final order disposing of a criminal case in court. It involves punishment, which is meted out by court to punish offenders. Those who are guilty will receive the prescribed punishment for their crime. Before the court passes sentence, a few steps are usually taken. Generally, the law does not fix a mandatory sentence for a certain offence. A maximum sentence is prescribed for the offence and the court is left to decide the appropriate sentence within the ambit of the punishment provision. In such a case, the accused will then makes a plea of mitigation, which is a submission to move the court to pass a lenient sentence. It bears noting that under the scheme of Chapter XX of CPC that governs the procedure of criminal trials in the High Court, there is no statutory requirement for mitigating factors to be considered by the court before it passes sentence according to law. Although there is no provision in the CPC for a plea in mitigation in High Court trials, nevertheless as a matter of fact, in practice it is quite common to allow a plea in mitigation before the court imposes sentence. After the accused has submitted the mitigation plea, the prosecution will submit the aggravating factors for the purpose of pressing for a heavy sentence.

[125] In passing sentence, the court takes into consideration the mitigating and aggravating factors in order to ensure that the sentence is in accordance with the law. Passing a sentence according to law means the sentence imposed must not only be within the ambit of the sentence period stipulated but also assessed and passed according to established judicial principles (see Jafa Daud at p. 316 of the judgment of Mohamed Azmi J).

[126] It can be seen from the foregoing discussion that in a case where a law does not fix a mandatory sentence for a particular crime, a judge is given a broad discretion to determine the appropriate sentence for an offender. Both the defence and the prosecution assist the court by forwarding submissions pertaining to sentence. In such circumstances, a mitigation plea is a constituent element of the sentencing process (see Zaidon Shariff v. PP [1996] 4 CLJ 441). A plea in mitigation must be considered together with the aggravating factors so as to strike a balance in the scale of justice (see: Raja Izzuddin Shah v. PP [1978] 1 LNS 165; [1979] 1 MLJ 270, Fu Foo Tong v. PP [1995] 1 SLR 448).

[127] *However, one crucial point must be highlighted here. Earlier, at [58] I have expressed my opinion that Parliament has the legislative power to prescribe the punishment for an offence, including prescribing the mandatory death penalty. In a case where the death penalty is the only punishment entrenched in the legislation, the mitigation plea plays no role in the sentencing process because of the automatic nature of the mandatory death penalty prescribed thereunder.* As correctly observed by *Mallal's Criminal Procedure*, 6th edn (2001), at footnote 4, para 9279, "Note however that where the accused is found guilty of an offence punishable with the mandatory death sentence, a plea in mitigation would serve no purpose".

[128] In the context of our present appeals, the punishment prescribed by s. 39B(2) of DDA and s. 302 of the PC is as follows:

Trafficking in dangerous drugs

39B(1) No person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Malaysia – (a) traffic in a dangerous drug; (b) offer to traffic in a dangerous drug; or (c) do or offer to do an act preparatory to or for the purpose of trafficking in a dangerous drug.

(2) Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against this Act and shall be punished on conviction with death.

Punishment for murder

302. Whoever commits murder shall be punished with death.

[129] *The wording of the impugned provisions is clear and unambiguous and "shall" as used therein has an imperative sense. That is not disputed. Once the person to be punished has been convicted by the court, there is no power on the part of the court to impose a different or lesser sentence.* Where the Legislature has by proper exercise of its powers prescribed that for drug trafficking and murder offences, the offenders shall be punished with a mandatory death penalty, the duty of the court is to impose the legislatively prescribed punishment on offenders. *The court has no choice but to impose the mandatory sentence provided by law as enacted by Parliament. There is no room to make the mandatory principle discretionary; otherwise it would amount to usurpation of constitutional powers of Parliament. The fact that the court has no alternative but to pass that sentence does not make the mandatory sentence unconstitutional. There is no denial of the equal protection of the law to the offenders. In this way, there is no denial of the right to a fair trial in a case of an offender that is deprived of a plea of mitigation before the court passes the mandatory death sentence.*

[130] *It will not be out of place, however, to mention here that in order to mitigate the mandatory sentence of death, there is provision for review by the Pardons Board and in suitable cases, death sentences are commuted to life imprisonment and even to lesser terms of imprisonment* (see: *Yee Kim Seng* at p. 254 of the judgment). In such a case, the factors advanced during

sentencing, however, may be relevant for the purpose of pardon. The power of pardon provided for under art. 42 of the FC is, however, a prerogative of mercy exclusively vested in the Yang di-Pertuan Agong or Ruler of any States in Malaysia (see *Sim Kie Chon v. Superintendent Of Pudu Prison & Ors* [1985] 2 CLJ 449; [1985] CLJ (Rep 293).

[131] *If a mitigation plea constitutes a right to a fair trial that is guaranteed under cl. (1) of art. 5, we can take the discussion further by asking whether in a case where the accused is found guilty of an offence punishable with the mandatory sentence, can that right be taken away? As we have noted earlier at [120], this right enshrined in cl. (1) of art. 5 is not absolute and is subject to qualifications. The key to the issue herein lies in the phrase 'save in accordance with law'.*

[132] *The position in law on this matter is now well-settled. That the constitutional rights as guaranteed under cl. (1) of art. 5 can be taken away in accordance with law has been authoritatively established by a line of our authorities. In other words, a law that provides for the deprivation of a person's life or personal liberty is valid and binding as long as it is validly passed by Parliament. The leading authority now is the decision of Selangor Pilot Association. In that case, the issue the Privy Council had to decide was whether the restriction on the exercise of a pilot's rights given by the grant of a license amounted to a deprivation of property and in violation of art. 13 of the FC which is headed "rights to property" that reads as follows:*

(1) No person shall be deprived of property save in accordance with law.

[133] It is necessary to appreciate what that case concerns. The respondents were pilots under the Port Authorities Act 1963 ('PAA'). The pilots had been carrying out the business of providing piloting services within a certain area of Port Klang under the Merchant Shipping Ordinance 1952 ("the Ordinance"). The PAA was amended in 1972 adding two new ss. 29A and 35A to the Ordinance. The effect of these new sections was to empower the port authority to declare an area as a pilotage area, in which event no person may act as a pilot in that area unless employed by the port authority. The Port Klang Authority declared Port Klang as a pilotage area. Some members of the association elected to work for the authority. But other members refused to work for the authority. They sued the Federal Government and the Port Klang Authority claiming that the amendments to the PAA were unconstitutional as it deprived them of their right to property (goodwill and livelihood) and that they were therefore entitled to compensation. The appellant argued among others that the respondent had not been deprived of any property and that a distinction should be drawn between on the one hand a mere negative prohibition of property (the pilots could operate at lots elsewhere) and on the other hand actual taking of property (which had not happened here). The Privy

Council allowed the appeal with a 4-1 majority (Lord Salmon dissenting). The Privy Council was of the view that the deprivation of the respondents of their property was in accordance with the law. Viscount Dilhorne (for the majority) said at pp. 135-136 (MLJ):

> Their Lordships agree that a person may be deprived of his property by a mere negative or restrictive provision but it does not follow that such a provision, which leads to deprivation, also leads to compulsory acquisition or use.
>
> If in the present case the Association was in consequence of the amending Act deprived of property, there was no breach of art. 13(1) for that deprivation was in accordance with a law which it was within the competence of the Legislature to pass.

[134] Further, in *Sugumar Balakrishnan* the Federal Court stated emphatically that the constitutional rights as guaranteed under cl. (1) of art. 5 of the FC could be taken away in accordance with law. In that case, the constitutionality of s. 59 of the Immigration Act 1959/1963 was challenged on the basis that the exclusion of the right to be heard in that provision, before the cancellation of respondent's entry permit, was unconstitutional as it was said to have infringed his right to livelihood. The Federal Court held that s. 59 that removes the *audi alteram partem* rule, which was duly enacted by Parliament is valid and constitutional.

[135] Additionally, this approach has been clearly upheld in the Federal Court decision of Bird Dominic Jude where the apex court cast its mind to the issue as to whether there is a specific law authorising the deprivation of the applicant's personal liberties. In light of the express provision authorising the deprivation of the personal liberty as set out in s. 56A of the Courts of Judicature Act 1964, the Federal Court refused to entertain the challenge to the provision on the ground of inconsistency with cl. (1) of art. 5.

[136] I have already expressed my view earlier that the legislative prescription of a mandatory death penalty is within the legislative power to enact. The impugned provisions are therefore valid and binding law passed by Parliament. Those provisions are specific and explicit laws that authorise automatic imposition of the death penalty if the accused person is convicted at the conclusion of the trial rendering the mitigation plea playing no role in the sentencing process. Therefore, the deprivation of the right to fair trial was in accordance with the law as the impugned provisions were duly enacted by Parliament. (emphasis added)

[68] It has been said in *Letitia Bosman* (*supra*) that "If a mitigation plea constitutes a right to a fair trial that is guaranteed under cl. (1) of art. 5, we can take the discussion further by asking whether in a case where the accused is found guilty of an offence punishable with the mandatory sentence, can that right be taken away? As we have noted earlier at para. [120], this right enshrined in cl. (1) of art. 5 is not absolute and is subject to qualifications. The key to the issue herein lies in the phrase 'save in accordance with law'."

[69] Further down in the learned judgment, Their Lordships said, "It bears noting that under the scheme of Chapter XX of CPC that governs the procedure of criminal trials in the High Court, there is no statutory requirement for mitigating factors to be considered by the court before it passes sentence according to law. Although there is no provision in the CPC for a plea in mitigation in High Court trials, nevertheless as a matter of fact, in practice it is quite common to allow a plea in mitigation before the court imposes sentence".

[70] Assuming that for the sake of the arguments, that notwithstanding the absence of a statutory requirement, based on the rule of *audi alteram partem*, mitigation is a right and so a right cannot be cast into oblivion and it must not be denied from the appellant.

[71] Hence it would follow that the learned Magistrate would have erred in law when she passed sentence before the mitigation was heard. Then, it also follows that this court must set aside the sentence that was handed down by the learned Magistrate.

[72] Further if, for the sake of the arguments that I do so and having done that, I must now consider what is the suitable sentence to be passed. The mitigation put forward is that the appellant is married with six children and an aged mother and his wife to support. He asked for a lenient sentence. He pleaded guilty at first instance. He has heart ailments which were all treated in a Government hospital.

[73] I shall now discuss what would be a suitable sentence on the facts and circumstances of the case. This brings us to the jurisprudence of sentencing in criminal procedural law.

Sentencing Principles

[74] There are many different purposes of sentencing. There is the deterrent factor, the rehabilitative factor, the punitive factor and the restorative factor. These are by no means exhaustive but these are the most common considerations.

[75] In *R v. Ball (Kenneth John)* [1951] 35 Cr App R 164, Justice Hilbery stated:

> *In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the*

A *sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within the maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.* (emphasis added)

B **[76]** One important point to consider is public interest which is often said, must supersede all else. What is public interest? *The Random House Dictionary of the English Language: The Unabridged Edition* (1994 edn) defines "public interest" as "the welfare or well-being of the general public and society".

C **[77]** There are many levels of importance to this concept of public interest. The first and foremost is the national security of the country. Without the national security in the country guaranteed, there is nothing that one may find, either in the form of rule of law, human rights, an orderly fashion of Governance, accountability as well as self-regulation by society or accepted
D public norms.

[78] The second is the public order where the rule of law is respected, procedures followed and one is not left bewildered by the haphazardness that is akin to the law of the jungle.

E **[79]** The third is the media interest where it invites attention by many, if not most members of society, that it would have some impact on the "good feel".

[80] Of course, sensationalist reporting is by no means within this category because there must be good and cogent reason(s) on why society is interested
F in the issues at hand, be it that it touches on the nerves of the right-thinking members of the flock for the inconsistency with the grundnorms, customs and usages or the general acceptance of things that happened which later became a matter of interest in the lives of its right-thinking members.

[81] If there is a conflict between the interest of society as a whole (as in
G the "public interest") and private interest, public interest must prevail. While not casting individual rights into oblivion, one cannot but accept that interest of many must necessarily override the individuals.

[82] The law is there to protect the individual rights as can be seen in the fundamental liberties in our Federal Constitution (see arts. 5 to 13).

H

[83] In *PP v. Loo Choon Fatt* [1976] 1 LNS 102; [1976] 2 MLJ 256 the court discussed the issues which are as follows:

In respect of sentencing there can be only general guidelines. No two cases can have exactly the same facts to the minutest detail. Facts do differ from case to case and
I *ultimately each case has to be decided on its own merits. In practice sentences do differ not only from case to case but also from court to court. All things being equal these variations are inevitable if only because of the human element involved. But, of course, there must be limits to permissible variations.*

The principles to be applied in imposing sentence however are the same in every case. The High Court sitting in exercise of its revisionary powers will not normally alter the sentence unless it is satisfied that the sentence of the lower court is either manifestly inadequate or grossly excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed on the record or to all the facts which the court ought to take judicial notice of, that is to say, that the lower court clearly has erred in applying the correct principles in the assessment of the sentence. It is a firmly established practice that the court will not alter a sentence merely because it might have passed a different sentence.

... Presidents and Magistrate are often inclined quite naturally to be over-sympathetic to the accused. This is a normal psychological reaction to the situation in which the lonely accused is seen facing an array of witness with authority. The mitigation submitted by a convicted person will also normally bring up problems of the family hardship and the other usual problems of living. In such a situation the courts might perhaps find it difficult to decide as to what sentence should be imposed so that the convicted person may not be further burdened with additional hardship. This in my view is wrong approach. The correct approach is to strike a balance, as far as possible, between the interest of the public and the interests of the accused.

(emphasis added)

[84] The Lord Chief Justice Lord Goddard in *Rex v. Grondkowski* [1946] 1 All ER 560, at p. 561 offered some good advice when he said:

> The judge must consider the interests of justice as well as the interest of the prisoners. It is too often nowadays thought, or seems to be thought, that the interest of justice means only the interest of prisoners.

[85] The court must take into account the private interest of the appellant and measure it against that of society. In so doing, the society must be protected from the act or acts of the appellant while the appellant be given the opportunity of reforming himself. Protecting the society from the acts of the appellant or like-minded individuals in the illegal acts and it is also to protect the appellant from the very act that he committed, by deterring others from committing the very same act(s) unto him. Hence it must be remembered that protecting society at large also means protecting the appellant himself.

[86] In our instant case, property belonging to the appellant must equally be protected from thievery or being kept by others with knowledge that it was stolen from the appellant.

[87] Hence among the factors to be taken into account are (but not limited to).

(i) The seriousness of the offence.

(ii) The protection of public interest.

(iii) When there is no justification for the criminal act perpetuated by the appellant.

(iv) Any previous conviction.

(v) Any plea of guilty.

[88] As Lord Justice Lawton put it in *Reg v. Sargeant* [1975] 60 Cr App R 74, 77, 78 (at p. 78) or, perhaps more appropriately transmuted in a local context, the creaking of the prison doors closing shut behind him will afford the appellant ample opportunity to ponder on his folly in the company he keeps, and give to others of his ilk and equally gullible, cause to reflect on the desirability of the company they should or rather should not keep, for, as the ancient adage goes, he who soups with the devil must use a long spoon. (*PP v. Teh Ah Cheng* [1976] 1 LNS 116; [1976] 2 MLJ 187).

[89] In our instant case, the offence is having in his possession motorcar that he has reasonable grounds to believe is stolen, contrary to s. 411 Penal Code that entails a minimum of six months imprisonment.

[90] There is this issue of in *PP v. Lee Lam (F)* [1952] 1 LNS 87; [1952] 1 MLJ 86, His Lordship, Justice Wilson had the occasion to comment on provision that provides for a minimum sentence as follows:

> *So far as this case is concerned the Legislative authority has laid it down that an accused person charged with an offence such as that alleged in the first charge shall be sent to prison for a period of not less than one year. If the Legislative authority had wished to say that such a person should not be sent to prison for this minimum period if he or she had no previous conviction, the Legislative authority would have so stated.* Whilst I have every sympathy with the domestic circumstances of the accused person, I find it impossible to allow myself to be influenced by them. During the period of this Emergency the Executive and the Legislature alone can be fully aware of the reasons which make extraordinary legislation necessary. Judges and Magistrates are not in a position and are not entitled to query such legislation unless it can be found to be *ultra vires.* (emphasis added)

[91] I fully agree with His Lordship, Justice Wilson that "so far as this case is concerned the legislative authority has laid it down that an accused person charged with an offence such as that alleged in the first charge shall be sent to prison for a period of not less than one year. If the legislative authority had wished to say that such a person should not be sent to prison for this minimum period if he or she had no previous conviction, the legislative authority would have so stated."

[92] The court cannot and should not usurp the functions of the Parliament in determining the appropriate sentence for a particular offence. This is provided for by arts. 73 and 74 Federal Constitution.

[93] Otherwise, it would be crossing the line and be guilty of judicial legislation, violating the separation of powers.

[94] Keeping in mind the principle that "if the legislative authority had wished to say that such a person should not be sent to prison for this minimum period if he or she had no previous conviction, the legislative authority would have so stated".

[95] The Federal Court in *Letitia Bosman* (*supra*) held that "The court has no choice but to impose the mandatory sentence provided by law as enacted by Parliament. There is no room to make the mandatory principle discretionary; otherwise it would amount to usurpation of constitutional powers of Parliament. The fact that the court has no alternative but to pass that sentence does not make the mandatory sentence unconstitutional. There is no denial of the equal protection of the law to the offenders. In this way, there is no denial of the right to a fair trial in a case of an offender that is deprived of a plea of mitigation before the court passes the mandatory death sentence."

[96] I am aware of a High Court decision of Her Ladyship Justice Zaharah (as she then was) in the High Court case of *PP lwn. Kandasamy Muniandy* [2005] 2 CLJ 201 where Her Ladyship imposed an order of binding over for good behaviour for an offence under s. 411 Penal Code. The facts of that case were that the accused stole parts of a bus that was left abandoned by the roadside. The owner did leave the bus abandoned and no longer wants it back. Technically it was still his bus as the certificate of ownership of the bus still, at the material time, had his name on it. There were extenuating circumstances that invited the application of s. 294 Criminal Procedure Code.

[97] I have scrutinised the facts of this case. Nowhere does it show that the owner had abandoned the stolen vehicle. It is in evidence that Nurul Farha binti Pardi who worked at the Statistics Department in Muar. Her office is situated at Wisma Tiam Lock (which is the Inland Revenue Board Building, Muar) at No. 19/4, Jalan Sungai Abong, 84000 Muar, in the District of Muar, in the State of Johor, had on 28 January 2020 at about 1pm, left the office to have lunch with friends and she went to the parking lot of the building where she left her car.

[98] When she reached her parking bay where she left her car earlier, the car which is a white Perodua MyVi 1.5 SE (auto) with the registration number JTN 1113, was no longer there. She immediately went to the security guard kiosk to view the CCTV and she saw through the video recordings that an unknown man got into her car and drove it off at about 11.15am that day. She then lodged a police report (Muar Report/1244/20) at the Muar police station in the State of Johor.

[99] The facts in *Kandasamy Muniandy* (*supra*) was clearly distinguishable from the facts of our case. I have considered s. 294 Criminal Procedure Code and I found "if it appears to the court that regard being had to the character, antecedents, age, health or mental condition of the offender or to the trivial nature of the offence or any extenuating circumstances under which the offence was committed it is expedient that the offender be released on probation of good conduct, the court may, …" is inapplicable in our instant case.

[100] Coming back to *Letitia Bosman* (*supra*), by the doctrine of *stare decisis*, I am bound to follow the decision of the Federal Court and since, for an offence under s. 411 Penal Code, the minimum sentence is six months imprisonment, and after finding s. 294 Criminal Procedure Code unsuitable, I would still sentence the appellant to an imprisonment term of six months from the date of this judgment.

Conclusion

[101] Section 316 Criminal Procedure Code reads as follows:

> **316. Decision on appeal**
>
> At the hearing of the appeal the Judge may, if he considers there is no sufficient ground for interfering, dismiss the appeal, or may:
>
> (a) in an appeal from an order of acquittal, reverse the order, and direct that further inquiry be made, or that the accused be retried, as the case may be, or find him guilty and pass sentence on him according to law;
>
> (b) in an appeal from a conviction or in an appeal as to sentence:
>
> (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried; or
>
> (ii) alter the finding, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence;
>
> (c) in an appeal from any other order, alter or reverse such order.

[102] The provision starts with "at the hearing of the appeal the judge may, if he considers there is no sufficient ground for interfering, dismiss the appeal, …".

[103] In short, there must be sufficient ground before the court should interfere.

[104] It is trite law that an appellate court will be slow to interfere with the sentence of the trial court merely because the appellate court would have imposed a different sentence. In this regard, the case of *Bhandulananda Jayatilake v. PP* [1981] 1 LNS 139; [1982] 1 MLJ 83 held:

> Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed different sentence is not sufficient, *per se*, to warrant this court's interference.

[105] In *Dato' Seri Anwar Ibrahim v. PP* [2002] 3 CLJ 457; [2002] 3 MLJ 193, the Federal Court said:

> It is of the utmost importance to stress here that the appellate court will not normally alter the sentence unless it is satisfied that the sentence passed by the lower court is manifestly inadequate or excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed or that the court has clearly erred in applying the facts disclosed or that the court has clearly erred in applying correct principles in the assessment of sentence, see *Public Prosecutor v. Loo Choon Fatt* [1976] 1 LNS 102; [1976] 2 MLJ 256.

[106] Similarly, in *PP v. Ahmad Khairul Fa'ais Mat Dahlan & Ors* [2006] 6 CLJ 555; [2006] 5 MLJ 190, His Lordship Justice VT Singham said:

> The court, in sentencing any prisoner, has an obligation to have regard to the public's expectation of what an appropriate punitive period of imprisonment should be having regard to all the relevant circumstances.

[107] Having heard all parties and having scrutinised the evidence with a fine comb, I found no error in the decision of the learned Magistrate in accepting the plea of guilty. I found the finding of conviction safe and if for the sake of the arguments that mitigation is of right, after setting aside the earlier sentence, I have reconsidered the law and facts and sentenced the appellant to an imprisonment term of six months from the date of this judgment.

[108] For the reasons aforesaid, I dismissed this appeal and affirmed both the conviction and sentence that was handed down by the learned Magistrate.